Supreme Court, U.S.
FILED
AUG 19 2016
OFFICE OF THE CLERK

No. 15-1191

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

LUIS RAMON MORALES-SANTANA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

IAN HEATH GERSHENGORN
Acting Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present or had a residence in the United States for a particular period of time prior to the child's birth. The questions presented are:

1. Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection.

2. Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-41a) is reported at 804 F.3d 520. The decisions of the Board of Immigration Appeals (Pet. App. 42a-44a) and of the immigration judge (Pet. App. 45a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2015, and amended on October 30, 2015. A petition for rehearing was denied on December 1, 2015 (Pet. App. 1a-2a). On February 16, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 30, 2016, and the petition was filed on March 22, 2016. The petition was granted on June 28, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

1. This case involves the constitutionality of statutory provisions governing when a child born abroad out of wedlock is granted United States citizenship at birth. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has conferred U.S. citizenship at birth on certain persons born outside of the United States and its outlying possessions through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* Those rules are designed to assure that children born abroad have a sufficient connection to the United States, through their legally recognized U.S.-citizen parents, to warrant conferral of U.S. citizenship, with the attendant rights and responsibilities that come with citizenship and the attendant duties of protection assumed by the U.S. government. When a foreign-born child is presumptively subject to competing claims of national allegiance because his parents are of different nationalities, Congress has required a stronger connection to the United States than when the child's national allegiance is likely to be exclusively to the United States.

At the time of respondent's birth in 1962, Pet. App. 6a, a child born outside the United States and its outlying possessions to married parents, both of whom were U.S. citizens, acquired U.S. citizenship if one of his parents had a residence in the United States or one of its outlying possessions at any time prior to the

child's birth. 8 U.S.C. 1401(a)(3).[1] The requirement was somewhat more demanding if one parent was a U.S. citizen and the other only a U.S. national:[2] the child acquired U.S. citizenship at birth if the U.S.-citizen parent had been physically present in the United States or one of its outlying possessions for a continuous period of one year. 8 U.S.C. 1401(a)(4).[3]

The requirement was markedly different if only one parent was a U.S. citizen and the other was an alien. In that situation, there was only one legally recognized parent through whom the child could establish the requisite connection to the United States, and there was, moreover, a competing connection to another country—the country of which the child's other parent was a citizen. The INA accordingly provided that when a child was born abroad to parents in

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[1] Unless otherwise noted, all references to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, the version of the relevant nationality provisions that were enacted as part of the INA and were in effect when respondent was born. Sections 1401 and 1409 have since been amended in various respects. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. Those amendments do not apply unless the child was born on or after November 14, 1986, and thus do not govern respondent's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2618-2619.

[2] Although all U.S. citizens are also U.S. nationals, "one can be a national of the United States and yet not a citizen." *Miller* v. *Albright*, 523 U.S. 420, 467 n.2 (Ginsburg, J., dissenting) (citing 8 U.S.C. 1101(a)(22)). "The distinction has little practical impact today, however, for the only remaining noncitizen nationals are residents of American Samoa and Swains Island." *Ibid.*

[3] Although Section 1401 generally refers to "outlying possessions" in addition to the "United States," for simplicity this brief will henceforth refer only to the "United States."

such a marriage, the child acquired U.S. citizenship at birth only if, at the time of the child's birth, the U.S.-citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7).[4]

While 8 U.S.C. 1401 governed the granting of U.S. citizenship to children born abroad to married parents, 8 U.S.C. 1409 governed the granting of citizenship to children born abroad out of wedlock. Section 1409(a) stated a general rule that certain provisions of Section 1401(a)—including paragraphs (a)(3), (a)(4), and (a)(7), discussed above—shall apply to a child born out of wedlock on or after the effective date of the 1952 Act if the child's paternity was established "by legitimation" while the child was under age 21. 8 U.S.C. 1409(a). Thus, upon legitimation, Section 1409(a) imposed the same conditions that would have applied if the parents had been married at the time of the child's birth. See *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18). Thus, if both

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[4] In the 1986 Act, Congress reduced the period of required physical presence in the United States to a total of five years, two of which must be after the parent turned 14. 1986 Act § 12, 100 Stat. 3657 (8 U.S.C. 1401(g)). In the 1934, 1940, and 1952 versions of the relevant statutory provisions, the child was required to satisfy an additional requirement that he reside in the United States for a particular period of time by a specified age. See Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797; Nationality Act of 1940, ch. 876, § 201(g), 54 Stat. 1139; INA § 301(b), 66 Stat. 236 (8 U.S.C. 1401(b)). That type of requirement was eliminated in 1978, Act of Oct. 10, 1978, Pub. L. No. 95-432, § 1, 92 Stat. 1046, and is not at issue in this case.

parents were U.S. citizens, even though unmarried at the time of the child's birth, it was sufficient upon later legitimation that one parent had a residence in the United States for any length of time prior to the child's birth. See 8 U.S.C. 1401(a)(3). But, as with married couples, if one parent was a U.S. citizen and the other was an alien, the U.S.-citizen parent must have been physically present in the United States for a total of ten years prior to the child's birth, at least five of which were after attaining the age of 14. See 8 U.S.C. 1401(a)(7).

Section 1409(c) created an additional basis for the granting of citizenship to a child born out of wedlock abroad. It provided that, notwithstanding 8 U.S.C. 1409(a), just discussed, such a child shall be a U.S. citizen if his mother was a U.S. citizen and had previously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c).[5] That rule reflected the reality that, when a child is born out of wedlock, there ordinarily is only one legally recognized parent—the mother—at the time of birth. Congress determined that, under those circumstances, the mother's one year of continuous physical presence in the United States prior to the child's birth abroad was sufficient to create the requisite connection to the United States.[6] That was the same one-year require-

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[5] Section 1409(c) provided that such a child would acquire his mother's "nationality status." If the child's mother was a U.S. citizen and satisfied the requirements of Section 1409(c), the child would be a citizen as well. See *Miller*, 523 U.S. at 467 n.2 (Ginsburg, J., dissenting).

[6] In certain circumstances, a child born out of wedlock abroad to a U.S.-citizen mother could acquire citizenship under the general rule in Section 1409(a) if his mother did not satisfy the one-year

ment Congress imposed under Section 1401(a)(4) when one parent was a U.S. citizen and the other was a U.S. national.

Section 1409(c) also ensured that the U.S. citizenship of a child born out of wedlock abroad to a U.S.-citizen mother who satisfied its physical-presence requirement could be definitively determined at birth, regardless of whether the father's parental status was legally established by legitimation at a later date. Section 1409(c) accomplished that result by providing that such a child was a U.S. citizen at birth "[n]otwithstanding the provision of subsection (a)" of Section 1409—notwithstanding, for example, that an alien father later legitimated the child, which under Section 1409(a) could otherwise have triggered the ten- and five-year physical-presence requirement because there were then two parents of different nationalities.

2. a. In 1962, respondent was born in the Dominican Republic to unmarried parents. Pet. App. 6a. Respondent's mother was a citizen of the Dominican Republic. *Ibid.* At the time of respondent's birth, his father was a U.S. citizen who had not spent more than five years in the United States after his 14th birthday. *Ibid.* Respondent's father legitimated respondent when he married respondent's mother in 1970, before

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continuous-physical-presence requirement in Section 1409(c). That would be true, for example, if (1) the father whose paternity was later established was also a U.S. citizen, in which case the child would be a U.S. citizen from birth under Section 1401(a)(3) if either parent had a residence in the United States for *any* period prior to the child's birth; or (2) the U.S.-citizen mother could satisfy the requirement of a *total* of ten- and five-years of physical-presence applicable under Section 1401(a)(7) when an alien father later legitimated the child, even though the mother did not have one year of *continuous* physical presence. See n.10, *infra*.

respondent turned 21. *Ibid.* Respondent was admitted to the United States as a lawful permanent resident in 1975. *Ibid.* Respondent's father died in 1976. *Ibid.*

In 1995, respondent was convicted of first-degree burglary, second-degree robbery, four counts of attempted murder, and second-degree criminal possession of a weapon. Pet. App. 46a. In 2000, respondent was placed in removal proceedings, in which he admitted that he was removable as an alien who had committed aggravated felonies and a firearms offense. *Id.* at 45a-46a. The immigration judge denied his applications for asylum and withholding of removal and ordered him removed from the United States. *Id.* at 47a-49a. Respondent filed motions for reconsideration and to reopen, see *id.* at 42a, claiming for the first time that he was a U.S. citizen by virtue of his father's U.S. citizenship. *Id.* at 8a, 42a-44a. The Board of Immigration Appeals (BIA) denied the last such motion in 2011 on the ground that his father had not satisfied the physical-presence requirements in 8 U.S.C. 1401(a)(7). Pet. App. 42a-44a.

b. Respondent petitioned for review of the BIA's decision in the Second Circuit. The court first rejected respondent's st utory arguments that he was a U.S. citizen at bir under 8 U.S.C. 1401. Pet. App. 8a-14a. The court held, however, that the statutory provisions governing the citizenship status at birth of a child born abroad out of wedlock to one U.S.-citizen parent and one alien parent violate the equal protection rights of respondent's U.S.-citizen father. *Id.* at 14a-41a.

Applying intermediate scrutiny, Pet. App. 16a-20a, the court of appeals acknowledged that the govern-

ment's interest in ensuring that foreign-born children of parents with different nationalities have a sufficient connection to the United States is important and justifies imposing a physical-presence requirement for the child's parent or parents. However, the court held that that interest did not justify imposing a different physical-presence requirement when the child was born out of wedlock to a U.S.-citizen mother. *Id.* at 21a-25a. The court also rejected the government's argument that Congress imposed a different physical-presence requirement on U.S.-citizen mothers of children born out of wedlock in order to reduce statelessness. *Id.* at 25a-32a. But the court further held that, even if Congress sought to reduce statelessness, its pursuit of that concededly important goal violated equal protection because, in the court's view, gender-neutral means of serving that interest were available. *Id.* at 32a-34a.

As a remedy, the court of appeals declared that respondent "is a citizen [of the United States] as of his birth," Pet. App. 41a, by extending the one-year continuous-physical-presence requirement in Section 1409(c) to unwed U.S.-citizen fathers (but not to married U.S.-citizen mothers and fathers). *Id.* at 36a. It rejected the government's argument that the proper remedy was to extend to unmarried U.S.-citizen mothers the ten- and five-year physical-presence requirements that otherwise applied under Section 1401(a)(7) when only one parent was a U.S. citizen and the other was an alien. *Id.* at 35a-41a.

SUMMARY OF ARGUMENT

I. Pursuant to its plenary power under the Constitution over naturalization, Congress has enacted a set of rules governing the acquisition of U.S. citizenship

at birth by individuals born abroad. Those rules are entitled to deferential rational-basis review. But even if this Court applies the type of heightened scrutiny applicable to gender-based equal protection challenges in the domestic context, the statutory scheme in 8 U.S.C. 1401 and 1409 is constitutional.

The generally applicable rules, set forth in 8 U.S.C. 1401, embody an important congressional judgment: when a child born abroad has parents of different nationalities, a stronger connection to the United States should be required than is required when the child's national allegiance is likely to be exclusively to the United States. The rules in Section 1401 implement that judgment, and do so in a manner that is gender-neutral: which rule applies depends not on the gender of a child's U.S.-citizen parent, but on whether the child has two legally recognized U.S.-citizen parents or has one legally recognized U.S.-citizen parent and one alien parent. With respect to the former category, Congress determined that a minimal physical connection between one of the child's parents and the United States was sufficient because influences from the child's parents would be American. With respect to the latter category, Congress determined that a longer ten-year physical connection between a child's U.S.-citizen parent and the United States was necessary because the child's alien parent would introduce a competing national influence and claim on national allegiance. The rules in Section 1401 are thus tailored to serve important government interests. And because those rules are gender neutral, they do not violate equal protection.

Section 1409 of Title 8 sets forth a complementary set of rules applicable to children born out of wedlock

abroad. Although the terms of Section 1409 do refer to a child's mother and father, that distinction is based on material differences in the legal relationship a mother has to her child at the moment of the child's out-of-wedlock birth, compared to the legal relationship the father has (or, more accurately, lacks) at that moment. When the relevant provisions were adopted in 1940 (and amended in 1952), it was well established that, in most of the world, the mother of a child born out of wedlock was the only legally recognized parent at the time of the child's birth. The father of such a child could later take steps to legally establish his paternity, but unlike the child's mother, he was generally not legally recognized as the child's parent by virtue of the birth itself. Thus, when a child was born out of wedlock abroad and that child's only legally recognized parent (his mother) was a U.S. citizen, Congress reasonably treated the child in a manner similar to a child with two legally recognized U.S.-citizen parents and required only a minimal physical connection to the United States. If that child's father subsequently established his legal paternity, Congress then treated the child as if his parents had been married at the time of his birth, applying the same ten- and five-year physical-presence requirements in Section 1401 that applied to the children of married parents with different nationalities.

Section 1409, as enacted in 1952, also served other equally important government interests. Congress was aware that the relevant provision of the Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137, could have been construed to delay acquisition of U.S. citizenship to a child born out of wedlock abroad to a U.S.-citizen mother until either the child's father

legitimated him and satisfied the ten- and five-year physical-presence requirements or the child reached the age of majority without being legitimated. Sensitive to problems of statelessness, Congress revised that provision by specifying in Section 1409(c) that a child whose mother satisfied the one-year continuous-presence requirement was a citizen at birth "[n]otwithstanding" Section 1409(a), which applied different rules upon legitimation by a U.S.-citizen father. Section 1409(c) also reflected the reality that, in nearly all countries where citizenship was acquired based on the citizenship of a child's parents (rather than based on the place of the child's birth), the only parent from whom a child born out of wedlock could acquire citizenship at birth was his mother.

The court of appeals erred in speculating that the rules set forth in Sections 1401 and 1409 were based on stereotypes about which parent should have custody and care of a child born out of wedlock. Those rules were based on the legal reality that most countries considered the mother of a child born out of wedlock to be the child's only legally recognized parent at birth. When legislating concerning individuals born abroad, Congress cannot be expected to ignore the state of the law throughout the world.

II. Even if this Court were to determine that the different physical-presence requirements in Sections 1401 and 1409 violate equal protection, respondent is not entitled to the relief he seeks, namely relief from an order of removal based on a determination that he has been a citizen from birth. Congress chose to apply the more stringent physical-presence requirements in Section 1401 to a substantial majority of children born abroad to one U.S.-citizen parent and one alien par-

ent. The proper way to cure any equal protection violation would be to apply, on a prospective basis, the longer physical-presence requirements in Section 1401 to children born out of wedlock to U.S.-citizen mothers. That is because the Judiciary may not properly declare a foreign-born person a citizen when Congress has not so provided, and because of the need to preserve necessary flexibility for Congress to address the issue going forward. The court of appeals' decision to apply the shorter physical-presence requirement in Section 1409(c) to children born out of wedlock to U.S.-citizen fathers contravened Congress's intent and could complicate future action by Congress. Equalizing the treatment of all children born abroad to one U.S.-citizen parent and one alien parent, as suggested by the government, would eliminate any equal protection problem and would most faithfully preserve Congress's policy choices.

ARGUMENT

Pursuant to its plenary constitutional power over naturalization, Congress has provided by statute that some foreign-born individuals are United States citizens from birth by virtue of their connection, through one or two U.S.-citizen parents, to the United States. In determining which foreign-born individuals should be considered U.S. citizens on that basis, Congress must balance competing national interests and take account of widely varied foreign laws. Congress is entitled to great deference in pursuing that constitutional responsibility, which inevitably touches on matters of sovereignty, foreign relations, and equitable considerations that are committed to the Legislative Branch. But whether this Court applies a deferential or heightened level of scrutiny, Congress does not

violate the Constitution by treating different categories of foreign-born children differently when the children—and their U.S.-citizen parents—were not similarly situated to each other. And when a child was born out of wedlock abroad to a U.S.-citizen mother, the child was not similarly situated to a child born out of wedlock abroad to an alien mother and a U.S.-citizen father whose paternal status was established only later as a legal matter. The court of appeals therefore erred in holding that the relevant provisions of 8 U.S.C. 1401 and 1409 violate equal protection. The court compounded its error when it remedied the perceived constitutional problem by extending U.S. citizenship to respondent—and to an untold number of other individuals who never had reason to consider themselves U.S. citizens. In doing so, the court of appeals exceeded its constitutional authority and ignored congressional intent.

I. THE RULES ESTABLISHED BY 8 U.S.C. 1401 AND 1409 FOR CONFERRAL OF CITIZENSHIP ON CHILDREN BORN ABROAD OUT OF WEDLOCK ARE FULLY CONSISTENT WITH THE CONSTITUTION

A. Congressional Enactments Governing Immigration And Naturalization Are Subject To A Deferential Standard Of Review

As this Court has long held, the Fourteenth Amendment "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States," a "person born out of the jurisdiction of the United States can only

become a citizen by being naturalized, either by treaty * * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that respondent was born outside the United States and is therefore not constitutionally entitled to citizenship. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971).

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress." *Wong Kim Ark*, 169 U.S. at 701. That authority encompasses both the power to grant citizenship to children who are born abroad of U.S.-citizen parents *and* the power not to do so. Acquisition of citizenship by such a child is thus entirely "dependent * * * upon statutory enactment." *Bellei*, 401 U.S. at 828. For at least three reasons, the Constitution's vesting in Congress of plenary authority to decide which persons born abroad should be granted U.S. citizenship requires that judicial review of Congress's judgments be highly deferential.

First, determinations about what classes of persons are eligible for statutory citizenship are quintessentially legislative. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893) (citation omitted); see 2 The Records of the Federal Convention of 1787, at 238 (Max Farrand ed., 1966) (remarks of Gouverneur Morris) ("[E]very Society from a great nation down to a club ha[s] the right of declaring the conditions on which new members should be

admitted."). Deciding which persons born abroad —who have not yet, and may never, set foot in the United States—should be granted U.S. citizenship involves fundamental questions of who should be entitled to share in the benefits and responsibilities of our constitutional democracy, including the protection of our Nation while abroad. See, *e.g.*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265-266 (1990); *Dames & Moore* v. *Regan*, 453 U.S. 654, 663-665, 676-679 (1981). That determination requires a complex weighing of competing considerations, including the presence or likelihood of ties to the United States, competing ties to other countries, equitable and moral factors, the laws of other nations, and the potential for dual citizenships or statelessness.

Second, the power to confer or deny citizenship on individuals born abroad—individuals who are "alien[s] as far as the Constitution is concerned"—is also an aspect of the power to exclude aliens from the Nation. *Miller* v. *Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment). That power "is an incident of every independent nation." *The Chinese Exclusion Case*, 130 U.S. 581, 603 (1889). Accordingly, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

Third, the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is

vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952). "Any rule of constitutional law that would inhibit the flexibility of the political branches of government to respond to changing world conditions should be adopted only with the greatest caution." *Mathews* v. *Diaz*, 426 U.S. 67, 81 (1976).

Although the Judiciary has a crucial role in protecting rights accorded under the Constitution to persons who have been granted citizenship by the Fourteenth Amendment or by Congress, and to those aliens who are in the United States, it is not the province of the Judiciary to determine which foreign-born persons should be permitted to become members of our Nation in the first place. Nor are the courts well-positioned to second-guess Congress's complex judgments about what classes of persons should be eligible for statutory citizenship.

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. That principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)); see also *id.* at 792 ("'[O]ver no conceivable subject is the legislative power of Congress more complete than it is over' the admission of aliens.") (quoting *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339

(1909)). Accordingly, Congress's judgments regarding the requirements that must be satisfied in order for a child born abroad to acquire U.S. citizenship at birth are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 794 (citation omitted).

The court of appeals erred in declining to adhere to that principle. The court declined to follow *Fiallo*, because the court viewed it as addressing only "Congress's 'exceptionally broad power' to admit or remove non-citizens." Pet. App. 17a (quoting *Fiallo*, 430 U.S. at 794). But the power to grant or deny citizenship to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is a different aspect of the same overarching sovereign power. In any event, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational-basis review should not apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents," who sought the excluded aliens' admission to this country. *Id.* at 794 (citation omitted). If rational-basis review applied in *Fiallo* to the aliens' reliance on the constitutional interests of U.S. citizens, it should apply equally to respondent's claim, which likewise rests entirely on the asserted constitutional interests of a U.S. citizen (respondent's father).

The court of appeals therefore erred in applying heightened scrutiny to Sections 1401 and 1409. As explained below, however, the court of appeals further erred in holding that the statutory scheme is unconstitutional under the heightened scrutiny applicable

to gender-based equal protection claims in the domestic context. Cf. *Nguyen* v. *INS*, 533 U.S. 53, 60-61, 72-73 (2001) (rejecting gender-based equal protection challenge to successor statutory scheme under intermediate scrutiny and declining to decide "whether some lesser degree of scrutiny pertains because the statute implicates Congress's immigration and naturalization power.").

B. The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government's Important Interest In Ensuring That A Child Born Abroad Has A Sufficiently Strong Connection To The United States To Warrant Conferral Of U.S. Citizenship At Birth

In exercising its plenary authority over naturalization, Congress has been cautious in extending U.S. citizenship at birth to foreign-born individuals, consistently requiring that they satisfy statutory criteria designed to ensure that they have a sufficiently robust connection to the United States to warrant the conferral of citizenship. This Court in *Nguyen* recognized that Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." 533 U.S. at 68. Of particular relevance here, when a foreign-born child is presumptively subject to competing claims of national allegiance because his parents have different nationalities, Congress has required a stronger connection to the United States than it has when the child's national allegiance is likely to be exclusively to the United States. The physical-presence requirements codified in Sections 1401 and 1409 are constitutionally sound means of serving that interest.

1. Congress has always used physical-presence or residence requirements to ensure that the U.S.-citizen parent of a foreign-born child has sufficient ties to the United States to justify conferring U.S. citizenship on the child

a. Since 1790, Congress has, "by successive acts," provided "for the admission to citizenship of * * * foreign-born children of American citizens, coming within the definitions prescribed by Congress." *Wong Kim Ark*, 169 U.S. at 672. From the outset, Congress has sought to ensure that children born abroad would not become citizens by virtue of a mere blood relationship to a U.S. citizen, without any other tie to this country. Congress has accomplished that goal primarily by extending citizenship to foreign-born children *only* if a U.S.-citizen parent satisfied a statutory requirement that the parent was physically present in (or had a residence in) the United States for a specified period of time.

The first such statute stated that a child born abroad to a U.S. citizen shall be a U.S. citizen "*[p]rovided*, [t]hat the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." Act of Mar. 26, 1790, ch. 3, 1 Stat. 104. Congress maintained that emphasis on paternal residence through succeeding statutes enacted in 1795, 1802, 1855, and 1907. Act of Jan. 29, 1795, ch. 20, § 3, 1 Stat. 415; Act of Apr. 14, 1802, ch. 28, § 4, 2 Stat. 155; Act of Feb. 10, 1855, ch. 71, § 1, 10 Stat. 604; Act of Mar. 2, 1907 (1907 Act), ch. 2534, § 6, 34 Stat. 1229; see *Bellei*, 401 U.S. at 823-824. In 1934, Congress eliminated the sole focus on the father's citizenship (and residence), instead providing on a prospective basis that any child "whose father or mother

or both * * * is a citizen" would be a citizen if at least one citizen parent satisfied a residency requirement. Act of May 24, 1934 (1934 Act), ch. 344, § 1, 48 Stat. 797. None of those statutes mentioned children born out of wedlock.

b. In 1940, Congress (at President Roosevelt's request) undertook a comprehensive overhaul of the Nation's nationality laws. The resulting Nationality Act of 1940, ch. 876, 54 Stat. 1137, again addressed the circumstances in which a foreign-born child of at least one U.S.-citizen parent would be granted U.S. citizenship from birth. Congress crafted that law against the backdrop of World War I, which threatened the lives, liberty, and property of U.S. citizens abroad, and at a time when democracy was under attack throughout the world and the United States faced grave difficulties in defending its interests and citizens abroad. The 1940 Act was the product of "a studied effort to * * * facilitate the naturalization of worthy candidates and, at the same time, protect the United States against adding to its body of citizens persons who would be a potential liability rather than an asset." H.R. Rep. No. 2396, 76th Cong., 3d Sess. 2 (1940).

The provisions of the 1940 Act governing the citizenship of foreign-born children of married parents imposed varying physical-presence or residency requirements depending on the citizen status of the child's parents. The least demanding requirement applied when a foreign-born child had two U.S.-citizen parents; in those cases, the child was granted U.S. citizenship from birth if at least one parent had resided in the United States at some point before the child's birth. 1940 Act § 201(c), 54 Stat. 1138. Congress could reasonably expect that the child of two

U.S. citizens, at least one of whom had resided in the United States, would have a sufficient connection to and develop a sufficiently strong allegiance to the United States to warrant granting U.S. citizenship at birth. See 1 House Comm. on Immigration and Naturalization, 76th Cong., 1st Sess., *Nationality Laws of the United States: Message from the President of the United States Transmitting a Report Proposing a Revision and Codification of the Nationality Laws of the United States, Prepared at the Request of the President of the United States, by the Secretary of State, the Attorney General, and the Secretary of Labor* 11 (Comm. Print 1938) (*Nationality Laws of the United States*) (where both parents of foreign-born children are U.S. citizens, "it is altogether likely that the children will be taught to speak the English language from infancy and will be so brought up that they will be truly American in character").

In contrast, when a foreign-born child had connections to two different countries through parents with different nationalities, and therefore was likely to have competing national allegiances, Congress required a more established connection between the U.S.-citizen parent and the United States. Thus, when a child was born abroad to married parents of different nationalities, Congress provided that the child would be a U.S. citizen from birth only if the U.S.-citizen parent had ten years' residence in the United States, at least five of which were after attaining age 16. 1940 Act § 201(g), 54 Stat. 1139.

The requirement of that greater connection to the United States in part reflected a concern that individuals born and residing abroad will be "alien in all their characteristics and connections and interests," not-

withstanding a biological connection to a U.S. citizen. *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings on H.R. 6127 Superseded by H.R. 9980 Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 37 (printed 1945) (1940 Hearings); see *Nationality Laws of the United States* 14. The 1940 Act thus embodied a determination to "prevent the perpetuation of United States citizenship by citizens born abroad who remain there, or who may have been born in the United States but who go abroad as infants and do not return to this country." S. Rep. No. 2150, 76th Cong., 3d Sess. 4 (1940) (1940 Senate Report). "Neither such persons nor their foreign-born children," Congress concluded, "would have a real American background, or any interest except that of being protected by the United States Government while in foreign countries." *Ibid.* And conferring citizenship at birth on foreign-born children of parents of different nationalities presented "greater difficulties" and "require[d] correspondingly stricter limitations." 1940 Hearings 423.

c. Congress also was reluctant to create dual citizens except in rare cases. This Court has recognized on several occasions that "Congress has an appropriate concern with problems attendant on dual nationality." *Bellei*, 401 U.S. at 831; see *Kawakita* v. *United States*, 343 U.S. 717, 733 (1952) ("One who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting."). During Congress's 1940 overhaul of the Nation's nationality laws, Representative Edward Rees—one of the primary participants in the committee tasked with preparing the new code—explained that

"[u]nder our laws the State Department has had much difficulty in trying to protect" dual nationals abroad. 1940 Hearings 241; see 1940 Senate Report 4 ("The State Department has also experienced considerable trouble through persons possessing dual nationality—that of the United States and of a foreign country—who continue to reside in the foreign country for many years while insisting upon protection by the Government of the United States."); see also Catheryn Seckler-Hudson, *Statelessness: With Special Reference to the United States* 11 (1934) (Seckler-Hudson) ("The position of individuals possessing two or more nationalities is a very awkward one since two or more states may claim them as subjects and hence claim their allegiance. In the event of a war arising between such states a conflict of duties is created for the individual who is claimed as a national by each.").

This Court has recognized the risk that "[c]ircumstances may compel one who has a dual nationality to do acts which otherwise would not be compatible with the obligations of American citizenship." *Kawakita*, 343 U.S. at 736. "An American who has a dual nationality may find himself in a foreign country when it wages war on us. The very fact that he must make a livelihood there may indirectly help the enemy nation," *id.* at 734, and he could be conscripted into military service against the United States. Congress therefore had compelling reasons to limit the extension of citizenship from birth to only those children born abroad to parents of different nationalities who could establish, through a U.S.-citizen parent, a sufficiently strong connection to the United States.

2. A foreign-born child with two legally recognized parents, only one of whom was a U.S. citizen, was not similarly situated to a foreign-born child with only one legally recognized parent, who was a U.S. citizen

a. Before the 1940 Act, none of the laws granting citizenship to foreign-born children had expressly addressed the status of children born abroad out of wedlock. For many years, however, the State Department interpreted and applied the 1907 and 1934 Acts to afford citizenship to such children who had a U.S. citizen father, if the child was subsequently "legitimated" by marriage of the child's mother and father or otherwise in accordance with the governing state or foreign law. See 1940 Hearings 431; 39 Op. Att'y Gen. 556 (1937); 32 Op. Att'y Gen. 162 (1920). In such cases, the relationship between father and child was retroactively "recognized as existing from the date of the child's birth," 32 Op. Att'y Gen. at 164, and the child was treated for purposes of acquiring citizenship as if his parents had been married at the time of his birth.

The State Department had also recognized as U.S. citizens children born abroad out of wedlock to U.S.-citizen mothers when the child's father had not legally established paternity through legitimation or adjudication and the U.S.-citizen mother was therefore the only legally recognized parent—reasoning that, in such cases, the mother stood in the position of the father for statutory purposes. 1940 Hearings 431. But the Attorney General rejected that practice in 1939, at least with respect to children born before the 1934 Act. 39 Op. Att'y Gen. 397 (1939); 39 Op. Att'y Gen. 290 (1939). In so doing, the Attorney General

observed that the issue of citizenship to children born abroad out of wedlock would be a proper subject for congressional action. 39 Op. Att'y Gen. at 291.

b. Congress took up that issue in its overhaul of the Nation's nationality laws in 1940. The first paragraph of Section 205 of the 1940 Act stated that "[t]he provisions of section 201" (which set forth the rules applicable to foreign-born children of married parents) "hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." 1940 Act § 205, 54 Stat. 1139. The second paragraph of Section 205 further stated that, "*[i]n the absence of such legitimation or adjudication*, the child, whether born before or after the effective date of this Act, if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 1940 Act § 205, 54 Stat. 1140 (emphasis added).

The first paragraph of Section 205 thus treated children born out of wedlock to U.S.-citizen mothers and those born to U.S.-citizen fathers the same (in terms of a physical-connection or residence requirement) in cases where the father legitimated the child before the child reached the age of majority—treating the children as if their parents had been married when the child was born. If both parents were U.S. citizens, the more lenient rule in Section 201(c) applied, requiring only prior U.S. residence by one parent. But if, as in respondent's case, only one parent was a U.S. citizen, the longer residence requirements in Section

201(g) applied, just as they would have if the child's parents had been married when the child was born.

But in addition to that general rule, the second paragraph of Section 205 provided that, when the unwed father (whether U.S.-citizen or alien) failed to take the steps necessary to legally establish his relationship to his child, the child was (at least retroactively) considered to have acquired U.S. citizenship from birth if the child's unwed mother was a U.S. citizen and had previously resided in the United States or an outlying possession. But Section 205 was ambiguous in one important respect: the use of the phrase "in the absence of legitimation or adjudication" left open the possibility that the citizenship of a child born out of wedlock abroad to a U.S.-citizen mother could not be determined until either the child's father legitimated him or he reached the age of majority, or that he would be divested of citizenship upon legitimation. See *Matter of M—*, 4 I. & N. Dec. 440, 442-445 (B.I.A. 1951).

Under the 1940 Act, when a child had two legally recognized U.S.-citizen parents, Congress required only a minimal physical connection (prior residency of any length) between at least one U.S.-citizen parent and the United States. 1940 Act §§ 201(c), 205, 54 Stat. 1138-1139. A similarly minimal physical connection was deemed sufficient when a foreign-born child had only one legally recognized parent at birth and that parent was a U.S. citizen. 1940 Act § 205, 54 Stat. 1140. By contrast, when a foreign-born child had two legally recognized parents, only one of whom was a U.S. citizen—because his parents were married at the time of his birth or were unmarried but his father later legitimated him—Congress understood that the

child would likely be subject to competing national loyalties. In those instances (like respondent's), Congress required that the U.S.-citizen parent establish a stronger physical connection to the United States as a means of ensuring that the child would form a stronger cultural and emotional tie and allegiance to the United States to offset any competing connection to another country.

c. A decade later, Congress revisited the subject of children born abroad out of wedlock when it enacted Section 309 of the INA, 66 Stat. 238 (8 U.S.C. 1409), in 1952. Congress made two relevant changes: (1) it required that, in order for a child born abroad out of wedlock to a U.S.-citizen mother to be granted U.S. citizenship at birth, the mother must have been physically present in the United States for one continuous year (rather than merely residing in the United States at some point) before the child's birth; and (2) made clear that the foreign-born child whose U.S.-citizen mother satisfied that physical-presence requirement would retain U.S. citizenship from birth regardless of whether his father later legitimated him. 8 U.S.C. 1409(a) and (c).

The first change ensured a somewhat stronger connection between the U.S.-citizen mother and the United States in order for her child to obtain citizenship. The second change eliminated the qualifier "[i]n the absence of such legitimation or adjudication" that had created uncertainty in Section 205 of the 1940 Act, 54 Stat. 1140, which had granted citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother. The new provision replaced that qualifier with the phrase "[n]otwithstanding the provision of" subsection (a) of 8 U.S.C. 1409, which provided

that the rule for the children of married parents would apply to the children of unmarried parents upon legitimation. That amendment made explicit that a child born out of wedlock to a U.S.-citizen mother could have his citizenship definitively determined at birth—without regard to whether the father's paternity was later legally established, through legitimation, which otherwise could have triggered the ten- and five-year physical-presence requirements under Sections 1401(a)(7) and 1409(a) applicable when there were two parents of different nationalities.

Although Section 1409(c) used gendered terms by referring to "the mother" of a child born out of wedlock, the differential treatment under that provision, as under the 1940 Act, turned on whether a foreign-born child had one legally recognized parent or two at the time of his birth.

d. Respondent errs in disputing (Br. in Opp. 14-16) that, at the moment of birth, the mother of a child born out of wedlock was typically treated throughout the world as the child's only legal parent. Although the father of such a child could establish a legally recognized relationship by marrying the mother or taking another step prescribed by law, in most of the world his relationship to his child was not legally recognized at the time of the child's birth. As one expert on international law wrote in the early years of the Twentieth Century: "If children are illegitimate, their father being necessarily *uncertain in law*, the nationality of the mother is their only possible root of nationality where national character is derived from personal and not from local origin. Accordingly, it is almost everywhere the rule that they belong to the state of which the mother is subject." William Ed-

ward Hall, *A Treatise on International Law* § 69, at 279 (8th ed. 1924) (*Treatise on International Law*) (emphasis added). Former State Department official Frederick Van Dyne agreed, concluding that "[t]he nationality of an illegitimate child born to an American mother abroad would, by the law of nations, follow that of the mother." Frederick Van Dyne, *Citizenship of the United States* 49 (1904); accord P. Weis, *Nationality and Statelessness in International Law* 97 (1956) (describing *jus sanguinis* as "acquisition of nationality by descent whereby, as a rule, an illegitimate child acquires at birth the nationality of his mother").

When Congress overhauled the Nation's nationality laws in 1940, it understood that the mother of a child born out of wedlock is typically the only legally recognized parent at the time of the child's birth. See 1940 Hearings 62-63 (Richard W. Flournoy, Assistant Legal Adviser, U.S. Department of State) (noting that, when a child is born out of wedlock, he has "only one legal parent" unless or until his father legitimates the child). Congress had before it a comprehensive study of foreign citizenship laws, undertaken by an Assistant to the Legal Adviser in the Department of State, which determined that 30 of the countries studied had enacted laws governing the citizenship of children born out of wedlock. The laws of 29 of those 30 countries provided that the child acquired the citizenship of his mother at birth (assuming the mother was a citizen of the relevant country), and in 19 of those 29 countries, the child would take the father's citizenship upon legitimation. Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-

259 & n.38 (1935) (Sandifer) (cited in 1940 Hearings 431). The study recognized that in most countries a child could not obtain his father's citizenship unless or until the father took "any act *legally establishing* filiation." *Id.* at 258 (emphasis added). The study further determined that Turkey was the *only* country that by law permitted a child born out of wedlock to "follow the father's nationality in the absence of any provision concerning *legal establishment* of the relationship." *Id.* at 258-259 (emphasis added). Thus, to the extent foreign nations (that did not confer citizenship based on place of birth) had codified laws governing the citizenship of a child born out of wedlock within their borders, nearly all provided that such a child would acquire the citizenship of his mother at the time of his birth, because at that point his unwed father would have no "legally establish[ed]" relationship to the child. *Id.* at 258; see 1940 Hearings 431 (noting that, in the referenced countries, a child born out of wedlock would take the nationality of his mother "in the absence of any act *legally establishing* filiation") (emphasis added); accord generally Richard W. Flournoy and Manley O. Hudson, *A Collection of Nationality Laws of Various Countries, as Contained in Constitutions, Statutes and Treaties* (1930) (cited in 1940 Hearings 431).

This Court has similarly recognized that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr* v. *Robertson*, 463 U.S. 248, 266-268 (1983); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.); cf. *Adoptive Couple* v. *Baby Girl*, 133 S. Ct. 2552, 2558-

2559 (2013). Indeed, this Court explained in *Nguyen* that a "significant difference" exists "between the[] respective relationships" of those mothers and fathers "to the potential citizen at the time of birth." 533 U.S. at 62. In particular, the Court explained that, while "the fact of parenthood" is established for an unwed mother "at the moment of birth," *id.* at 68, "that legal determination with respect to fathers" may constitutionally be subject to "a different set of rules" because the two parents are not similarly situated, *id.* at 63. See *Miller*, 523 U.S. at 443 (Stevens, J.) ("[I]t is not merely the sex of the citizen parent that determines whether the child is a citizen under the terms of the statute; rather, it is an event creating a *legal relationship* between parent and child—the birth itself for citizen mothers, but postbirth conduct for citizen fathers and their offspring.") (emphasis added).[7]

e. When respondent was born out of wedlock in the Dominican Republic, his mother was not a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*, much less a claim to U.S. citizenship. When respondent's U.S.-citizen father later legitimated respondent by marrying respondent's mother, respondent then had two legal parents, one of whom remained an alien. The

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[7] See also *Nguyen*, 533 U.S. at 61 ("[A] citizen mother expecting a child and living abroad has the right to reenter the United States so the child can be born here and be a 14th Amendment citizen. From one perspective, then, the statute simply ensures equivalence between two expectant mothers who are citizens abroad if one chooses to reenter for the child's birth and the other chooses not to return, or does not have the means to do so. This equivalence is not a factor if the single citizen parent living abroad is the father. For, unlike the unmarried mother, the unmarried father as a general rule cannot control where the child will be born.").

general rule in 8 U.S.C. 1409(a) and 1401(a)(7) for that two-parent situation therefore applied. Respondent's father thus was not similarly situated to a U.S.-citizen mother of a child born abroad out of wedlock, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child's birth, would have been a legally recognized parent and typically the only such parent, and there accordingly would have been no competing parental claim of a connection to a foreign country. By contrast, when respondent was born, he had no *legal* relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legally recognized parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to *married* couples of different nationalities.

Because a U.S.-citizen mother and U.S.-citizen father were therefore not similarly situated in their relationship to a child born abroad out of wedlock, the separate provision in 8 U.S.C. 1409(c) for acquisition of citizenship by the child of an unwed U.S.-citizen mother does not violate equal protection, even under intermediate scrutiny. See *Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984) (*Mathews*).

C. The Rules Established By Sections 1401 and 1409 Are Substantially Related To The Government's Important Interest In Reducing The Risk That A Foreign-Born Child Of A U.S. Citizen Would Be Born Stateless

The challenged statutory provisions also served a second important interest: reducing the risk that the child of a U.S. citizen would be stateless at birth. Although the court of appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it erroneously concluded that such an interest did not justify the statutory provisions Congress enacted. Pet. App. 25a-34a.

1. A child born out of wedlock abroad to a U.S.-citizen mother was at substantially greater risk of being born stateless than was the foreign-born child of a U.S.-citizen father

The differences embodied in the physical-presence requirements in Sections 1409 and 1401 reflect the reality that children born out of wedlock abroad to a U.S.-citizen mother were at risk of having no citizenship at birth. When Congress enacted the comprehensive nationality code in 1940 and substantially revised it in 1952, that risk was greater for those children than it was for children born out of wedlock to an alien mother and a U.S.-citizen father who only later legitimated the child.

Unlike the United States, which affords citizenship on a "*jus soli*" basis to all who are born in the United States and subject to its jurisdiction, many other countries apply "*jus sanguinis*" rules, under which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). In most of those countries (as

in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See pp. 28-31, *supra*; see also Sandifer 258-259 & n.38 (cited in 1940 Hearings 431). Although in general the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based was the mother. As a result, there was a substantial risk that a child born out of wedlock to a U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of his mother. The court of appeals rejected this important government interest because it was not convinced "that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers." Pet. App. 31a. That was error.

When a child was born in a *jus sanguinis* country to parents of different nationalities, the child was stateless unless either the laws of that country or the laws of the country of one parent's nationality conferred citizenship on him at the time of his birth. See, *e.g.*, Int'l Union for Child Welfare, *Stateless Children: A Comparative Study of National Legislations and Suggested Solutions to the Problem of Statelessness of Children* 7 (1947) (concluding that one of the primary categories of stateless children is "[c]hildren who are directly subjected to the consequences of the conflict

between the *jus sanguinis* and the *jus soli*"); Comm. on Nationality & Statelessness of the Am. Branch of the Int'l Law Ass'n, *Report on Nationality and Statelessness, 1950 Committee Reports of the American Branch of the International Law Association* 57 (1950). Experts in nationality and international law have long agreed that the risk of being born stateless was particularly high for a child born out of wedlock in a *jus sanguinis* country unless the child could obtain his mother's citizenship. See, *e.g.*, *Treatise on International Law* § 69, at 238 (quoted at p. 28, *supra*). Thus, when a U.S.-citizen mother had a child out of wedlock abroad in a *jus sanguinis* country, her child was at great risk of being born stateless unless U.S. law provided U.S. citizenship for the child.

The circumstances were different for a child born abroad out of wedlock to an alien mother and a U.S.-citizen father who only later established his paternal status. The same foreign laws that would put the child of the U.S.-citizen mother at risk of statelessness (by not providing for the child to acquire the father's citizenship at birth) would *protect* the child of the U.S.-citizen father against statelessness by providing that the child would take his mother's citizenship.

In 1934, the author of the first monograph on statelessness wrote that, "if an illegitimate child is born abroad of an American mother and an alien father in a country whose nationality laws provide that the citizenship of the illegitimate child follows that of the mother, the child probably has no nationality since American statutory law has not made the status of such a child clear." Seckler-Hudson 224. The court of appeals thus erred in denying the existence of a prob-

lem that was widely acknowledged when Congress acted in 1940 and 1952.

2. Congress enacted the challenged provisions to reduce the risk that the foreign-born child of a U.S. citizen would be born stateless

The court of appeals compounded its error by rejecting the government's submission that Congress "enacted the 1952 Act's gender-based physical presence requirements out of a concern for statelessness." Pet. App. 31a; see *id.* at 26a-32a. Abundant evidence demonstrates that Congress was aware of and concerned about the problem of statelessness, and that Congress revised the relevant provisions in 1952 with the specific intent of reducing the risk that a child born out of wedlock abroad to a U.S.-citizen mother would be born stateless.

During and following the First and Second World Wars, Congress and the world became acutely aware of the problem of statelessness. See, *e.g.*, United Nations, *A Study of Statelessness* 4-7 (1949), http://www.unhcr.org/3ae68c2d0.pdf. The 1952 legislative overhaul enacted as the INA was undertaken pursuant to a 1947 Senate resolution that directed the Senate Judiciary Committee "to make a full and complete investigation of our entire immigration system" and to submit a report "with such recommendations for changes in the immigration and naturalization laws as [the Committee] may deem advisable." S. Res. No. 137, 80th Cong., 1st Sess. (1947), *reprinted in* S. Rep. No. 1515, 81st Cong., 2d Sess. 803 (1950) (1950 Senate Report). The same resolution directed the Committee to investigate "the situation with respect to displaced persons in Europe and all aspects of the displaced-persons problem," which encompassed the problem of

statelessness, and to submit a separate report on that topic. *Ibid.* Congress thus viewed the task of addressing problems of statelessness as part and parcel of the 1952 overhaul of the Nation's immigration and naturalization laws.

Section 205 of the 1940 Act on its face presented a real risk of statelessness. Section 205 provided that, "*[i]n the absence of such legitimation or adjudication*" "during minority," a child born out of wedlock abroad to a U.S.-citizen mother would "be held to have acquired at birth" the U.S. citizenship of his mother if his mother "had previously resided in the United States or one of its outlying territories." 1940 Act § 205, 54 Stat. 1139-1140 (emphasis added). On its face, that language suggested that the acquisition of U.S. citizenship by a child born abroad to an unmarried U.S.-citizen mother could not be determined definitively either until the father legally established his parental relationship through legitimation or adjudication or until the child reached the age of majority and no such legitimation or adjudication had occurred. Under that view of the 1940 Act, such a child would have been at great risk of having no nationality (*i.e.*, being stateless) from the time of his birth until either legitimation or majority. Although in 1951 the BIA interpreted Section 205 as granting U.S. citizenship from birth to a child born out of wedlock abroad to a U.S.-citizen mother, regardless of later legitimation (and the Department of State now concurs in that interpretation of the statute), the Department of State held the view that such a child would not be a citizen upon legitimation by his father unless his mother or father could satisfy the applicable residence requirement in Section 201. See *Matter of M—*, 4 I. & N.

Dec. at 442-445. And Congress understood that the text of Section 205 of the 1940 Act could be interpreted to render such a child stateless from his birth until such time as his father legally established paternity—or until the child reached age 21 if the father's paternity had not been legally established. See 1950 Senate Report 676 (explaining that a child born abroad out of wedlock would "have the nationality status of [his] mother," but only "in the absence of legitimation").

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on a U.S.-citizen mother's one year of continuous physical presence in the United States was effective at the time of the child's birth and was not contingent on whether the child's father later established his own legal relationship. The enactment in the INA of 8 U.S.C. 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: "This provision establishing the child's nationality as that of the [U.S.-citizen] mother *regardless* of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*" S. Rep. No. 1137, 82d Cong., 2d Sess. 39 (1952) (1952 Senate Report) (emphases added).

The court of appeals dismissed that clear statement of congressional purpose: "Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue." Pet. App. 29a n.10. That reasoning cannot be reconciled with the Report's words, which directly link the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such chil-

dren "shall have a nationality at birth." 1952 Senate Report 39.[8]

3. The court of appeals erred in speculating that Sections 1401 and 1409 "arguably" reflect gender stereotypes

a. The court of appeals dismissed the government's interest in reducing the risk of statelessness based in part on speculation that the different physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock." Pet. App. 31a. The statutory scheme reflects no such gender-based generalizations.

The challenged distinctions turned instead on rules establishing the legal status of parent and child, both abroad and in this country. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same when they are not similarly situated. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held in *Nguyen*, a case also involving Section 1409, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see

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[8] Section 1409(c) also made clear that a child born out of wedlock abroad to a U.S.-citizen mother would not be divested of his U.S. citizenship if his father legally established his paternity through legitimation. It provided that, "[n]otwithstanding the provision of" Section 1409(a), which standing alone would have triggered the longer physical-presence requirement when there were two parents of different nationalities, the foreign-born child of an unwed U.S.-citizen mother would be a U.S. citizen from birth if the mother satisfied the one-year continuous-physical-presence requirement.

also *Lehr*, 463 U.S. at 266-268; *Parham*, 441 U.S. at 355 (opinion of Stewart, J.). The difference in each parent's treatment under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between their respective relationships to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

The court of appeals apparently speculated that the domestic and international laws that recognized the mother of a child born out of wedlock as the only legally recognized parent at the time of birth were developed based on stereotypes about which parent of such a child *should* care for and be responsible for the child. See Pet. App. 31a n.13. But such speculation about motivations for other laws here and abroad cannot be a basis for invalidating an Act of Congress, and Congress cannot be expected to ignore the relevant foreign and domestic laws that did exist. Indeed, Congress obviously has no authority to override the citizenship or paternity laws of other countries; and Congress has historically left it to the States to regulate familial relationships in the United States. Congress therefore did not engage in "impermissible stereotyping," *id.* at 32a, when it legislated against the reality that, in most of the world (as in the United States), when a child was born out of wedlock, his mother was his only legally recognized parent at the time of birth and therefore the only possible source of citizenship through a legally recognized parent.

b. The implications of the constitutional rule respondent seeks could be far-reaching. If this Court were to find that Congress may not treat the parental

relationship of unwed citizen fathers at the moment of a child's birth differently than the parental relationship of unwed citizen mothers in the context of immigration and naturalization, where Congress has particularly broad discretion, there surely would be a flood of litigation contending that the States must revise their laws—including those governing adoption, inheritance, wrongful death, and residency—that similarly distinguish between those two relationships.

Even today, the father of a child born out of wedlock anywhere in the United States must take some affirmative step to establish his legal status as the child's father.[9] For mothers, parental status is

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[9] See, *e.g.*, Ala. Code § 26-17-304 (LexisNexis 2009); Alaska Stat. § 25.20.050 (2014); Ariz. Rev. Stat. Ann. § 25-812 (Supp. 2015); Ark. Code Ann. § 9-10-120 (2015); Cal. Fam. Code §§ 7573, 7574 (West 2013); Colo. Rev. Stat. § 19-4-105 (2015); Conn. Gen. Stat. Ann. § 45a-604 (West 2014); Conn. Gen. Stat. Ann. § 46b-172 (West Supp. 2016); Del. Code Ann. tit. 13, § 8-201 (Supp. 2014); D.C. Code Ann. § 16-2342.01 (LexisNexis 2001); Fla. Stat. Ann. § 742.10 (West 2016); Ga. Code Ann. § 19-7-46.1 (2015); Haw. Rev. Stat. Ann. § 584-4 (LexisNexis 2015); Idaho Code Ann. § 7-1106 (2010); 750 Ill. Comp. Stat. Ann. § 46/301 (West Supp. 2016); Ind. Code Ann. § 16-37-2-2.1 (LexisNexis Supp. 2016); Iowa Code Ann. § 252A.3A (West Supp. 2016); Kan. Stat. Ann. §§ 65-2409a (Supp. 2015); Ky. Rev. Stat. Ann. § 213.046 (LexisNexis 2015); La. Rev. Stat. Ann. § 9-392 (Supp. 2015); Me. Rev. Stat. tit. 19-A, §§ 1861, 1862 (Supp. 2015); Md. Code Ann., Fam. Law § 5-1028 (LexisNexis 2012); Mass. Ann. Laws ch. 209C, § 11 (LexisNexis 2011); Mich. Comp. Laws Ann. § 722.1003 (West Supp. 2016); Minn. Stat. Ann. § 257.34 (West 2015); Miss. Code Ann. § 93-9-28 (West Supp. 2015); Mo. Ann. Stat. § 193.215 (West Supp. 2016); Mont. Code Ann. § 40-6-105 (West 2015); Neb. Rev. Stat. Ann. § 43-1408.01 (LexisNexis 2016); Nev. Rev. Stat. Ann. § 126.053 (LexisNexis 2010); N.H. Rev. Stat. Ann. § 5-C:24 (LexisNexis 2014); N.H. Rev. Stat. Ann. § 168-A:2 (LexisNexis 2010); N.J. Stat. Ann. § 26:8-28.1 (West 2007); N.M. Stat. Ann. § 24-14-13 (2015); N.Y. Pub. Health

generally established by the act of giving birth. See *Nguyen*, 533 U.S. at 64. The fact that respondent's arguments would call into question the constitutionality of laws in every State of the Union is an additional reason to reject respondent's position.

D. Congress Chose Appropriate Means To Achieve Its Important Interests

In enacting the challenged laws, Congress faced a complex task: to craft a set of uniform rules that would apply to individuals not located in the United States and that would serve important, but sometimes competing, government interests. Even in the context of considering gender-based equal protection challenges in the domestic context, this Court has never required a perfect fit between means and ends. Flexibility is especially necessary in the context of naturalization, where the rules Congress enacts must operate in combination with the rules of other nations—rules over which Congress has no control and that are likely to change over time. Here, as this Court concluded with respect to another aspect of Section 1409, "[t]he fit between the means [Congress chose] and the im-

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Law § 4135-b (McKinney Supp. 2016); N.C. Gen. Stat. § 130A-101 (2015); N.D. Cent. Code §§ 14-20-11, 14-20-12 (2009); Ohio Rev. Code Ann. § 3111.02 (LexisNexis 2015); Okla. Stat. Ann. tit. 10, § 7700-301 (West 2009); Or. Rev. Stat. § 432.098 (2015); 23 Pa. Cons. Stat. Ann. § 5103 (West 2010); R.I. Gen. Laws § 15-8-3 (2013); S.C. Code Ann. § 63-17-60 (2010); S.D. Codified Laws § 25-8-52 (2013); Tenn. Code Ann. § 68-3-305(b) (2013); Tex. Fam. Code Ann. § 160.301 (West 2014); Tex. Fam. Code Ann. § 160.302 (West Supp. 2016); Utah Code Ann. § 78B-15-301 (LexisNexis 2012); Vt. Stat. Ann. tit. 15, § 307 (2010); Va. Code Ann. § 20-49.1 (2016); Wash. Rev. Code Ann. § 26.26.300 (West 2016); W. Va. Code Ann. § 48-24-106 (LexisNexis 2015); Wis. Stat. Ann. § 767.805 (West Supp. 2015); Wyo. Stat. Ann. §§ 14-2-601, 602 (2015).

portant end[s] is 'exceedingly persuasive.'" *Nguyen*, 533 U.S. at 70 (quoting *United States* v. *Virginia*, 518 U.S. 515, 533 (1996)).

1. The court of appeals erroneously concluded that the government's important interest in reducing statelessness was not sufficient to justify the statutory scheme because, it reasoned, "effective gender-neutral alternatives" were available at the time of the statute's enactment. Pet. App. 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

> A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Id. at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. on Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull's proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same manner as Section 1409(c). It was only when the child was born out of wedlock to a U.S.-citizen mother that the child would have only

one legally recognized parent. That was clear to observers at the time. See 1933 Hearing 56 (testimony of Burnita S. Williams, National Woman's Party) (noting that "[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women").

For purposes of assessing respondent's equal protection challenge, the salient fact is how the challenged law *operates*, not the words it uses. As this Court explained in *Nguyen*:

> The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64. The court of appeals therefore erred in relying on a proposal Congress declined to adopt more than 80 years ago to invalidate a statutory framework that has governed the acquisition of U.S. citizenship in this context since 1940.

During a hearing on Secretary Hull's proposed amendment, moreover, Congress considered an objection (from a member of the National Women's Party) to the amendment based on the fact that it would "require[]" State Department personnel "to know what the law is on the subject of illegitimacy in every country of the world" because "[t]hey would have to

know what the law is on the subject of illegitimacy in order to determine whether or not at the place of birth there was a legal parent, or whether one or the other was a legal parent." 1933 Hearing 56. Such a requirement, the witness testified, "would create an extraordinary situation" in which "we would not know where we were." *Ibid.* As a practical matter, official determinations about the U.S. citizenship of foreign-born children are often made many years after the child's birth, as was the case here. A post-hoc inquiry into the laws and informal interpretations that a foreign nation applied many years earlier could be quite difficult. Such a system also would not have provided notice to an expectant U.S.-citizen parent about the consequences of choosing to have the child born abroad rather than in the United States.

This court acknowledged in *Nguyen* that Congress has leeway in crafting citizenship laws to "enact[] an easily administered scheme," 533 U.S. at 69, instead of requiring more specific inquiries. It is worth noting, moreover, that the provision suggested in 1934 would offer no help to respondent, who has never even suggested that he was stateless at the time of his birth in the Dominican Republic.

2. Respondent protests (Br. in Opp. 14, 18-19) that the means Congress chose to further its important interests are insufficiently tailored to satisfy heightened scrutiny because (1) not every country had a statute providing that the mother of a child born out of wedlock was the child's only legally recognized parent—and therefore the only possible source of citizenship in a *jus sanguinis* country—at the moment of birth, and (2) children born abroad in *jus soli* countries were not at risk of being stateless regardless of

who their parents were. Respondent's objections are misguided.

Respondent correctly notes (Br. in Opp. 15) that the Sandifer article on which Congress relied in 1940 stated that approximately half of the countries the author surveyed "had no specific laws governing the citizenship of non-marital children." But our own Nation's history of naturalization laws before 1940 (see p. 24, *supra*) demonstrates that, even in the absence of a statute specifically addressing that situation, most countries as a practical matter based the citizenship of such a child on that of his mother (when a *jus soli* rule was not applicable) because, in the absence of legitimation, the mother was the child's only legally recognized parent. As explained at pp. 28-31, *supra*, experts and scholars agreed that in most of the world his only legally recognized parent at birth was his mother—and therefore that "it [was] almost everywhere the rule that [such children] belong to the state of which the mother is a subject." *Treatise on International Law* 279; see *Nationality and Statelessness in International Law* 97.

Respondent fares no better with his argument (Br. in Opp. 18-19) that the relevant provisions in Section 1409 are unconstitutional because children born in *jus soli* countries faced no risk of statelessness. As this Court explained in *Nguyen*, "[n]one of [the Court's] gender-based classification equal protection cases have required that the statute under consideration must be capable of achieving its ultimate objective in every instance." 533 U.S. at 70. Even under heightened scrutiny, a classification need not be drawn with mathematical precision as long as there is a substantial fit between Congress's objectives and the means

of achieving them. In particular, this Court has recognized that "legislative distinctions in the immigration area need not be as 'carefully tuned to alternative considerations' as those in the domestic area." *Fiallo*, 430 U.S. at 799 n.8 (citations and internal quotation marks omitted). And when, as here, Congress is attempting to accommodate sometimes-competing interests, it is not possible to craft a solution that perfectly serves all interests. Respondent also ignores the fact that, even though the child born out of wedlock to a U.S.-citizen mother in a *jus soli* country might not have been stateless, Congress could still conclude that the child should be permitted to acquire U.S. citizenship at birth because the only legal tie to a country *through the citizenship of a parent*, who could be expected to foster cultural affinity and allegiance, was to the United States.

3. Finally, as this Court recognized in *Nguyen*, the rules set out in Sections 1401 and 1409 were not (and are not) the exclusive means by which a foreign-born child could become a U.S. citizen. Under Section 322(a) of the INA, 66 Stat. 246, for example, if the foreign-born child of a U.S.-citizen parent did not secure U.S. citizenship at birth because his parent(s) did not satisfy the applicable physical-presence requirement, the citizen parent could petition to naturalize the child if the child was under the age of 18 and was residing permanently in the United States in the custody of the citizen parent, pursuant to a lawful admission for permanent residence. 8 U.S.C. 1433(a) (1958). That option was presumably available to respondent's father when respondent was admitted to the United States as a lawful permanent resident in 1975. And under current law, if the foreign-born child

of one citizen parent does not secure U.S. citizenship at birth because that parent did not have sufficient physical presence in the United States, the child is *automatically* a citizen under 8 U.S.C. 1431(a) if the child moves to the United States before turning 18 and resides in the legal and physical custody of that parent pursuant to a lawful admission for permanent residence.

In addition, a foreign-born child who does not qualify for citizenship at birth pursuant to Sections 1401 and 1409, but nevertheless develops substantial connections to the United States through permanent residence in the United States, may apply to become a naturalized citizen upon reaching age 18 through the standard naturalization procedures. See 8 U.S.C. 1423, 1427, 1445(b). Congress cannot be faulted if petitioner did not seek to take advantage of that process (or if he rendered himself ineligible by engaging in criminal activity, see Pet. App. 46a). *Nguyen*, 533 U.S. at 71 ("This option now may be foreclosed to Nguyen, but any bar is due to the serious nature of his criminal offenses, not to an equal protection denial or to any supposed rigidity or harshness in the citizenship laws.").

II. THE COURT OF APPEALS EXCEEDED ITS CONSTITUTIONAL AND STATUTORY AUTHORITY BY EXTENDING U.S. CITIZENSHIP TO RESPONDENT

This Court has noted that, when a court sustains an equal protection claim, it "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Mathews*, 465 U.S. at

738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers)."). The court of appeals chose to remedy the equal protection violation it perceived by "replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)." Pet. App. 40a. In other words, the court extended what it viewed as the more favorable treatment to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers). The court erred in choosing that remedy because it flouts congressional intent and exceeds the court's authority with respect to naturalization.

A. If made generally applicable, the court of appeals' choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set

by Congress and who grew up with no expectation that they were citizens of the United States—and would do so in order to remedy the perceived violation of their *parents'* rights, rather than their own.[10] That result is inconsistent with this Court's cases holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers pursuant to Section 1409(a)

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[10] The court of appeals also failed to grasp that its remedy could make it *harder* for some U.S.-citizen fathers of children born out of wedlock to satisfy the conditions necessary for their children to be U.S. citizens at birth under Section 1409. The court focused exclusively on the difference in *length* between the ten- and five-year physical-presence requirements made applicable by 8 U.S.C. 1409(a) and the one-year continuous-physical-presence requirement in Section 1409(c), without acknowledging that the relevant ten and five years need not be continuous. For example, some U.S.-citizen fathers who lived in the United States near the border with Mexico or Canada, and who traveled back and forth, might have been able to satisfy the ten- and five-year physical-presence requirements but not the one-year *continuous*-physical-presence requirement.

violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").[11]

In this context, any judicially crafted remedy must be carefully tailored to preserve the degree of flexibility necessary for Congress to address the problem, balancing competing interests while exercising its exclusive authority over naturalization. If this Court were to conclude that the existing scheme violates equal protection, it should remedy such a violation by extending, on a prospective basis, the longer physical-presence requirements in Section 1401(a), made applicable through Section 1409(a), to children born out of wedlock to U.S.-citizen mothers. Such a ruling would allow Congress to decide whether or how to extend U.S. citizenship to children born out of wedlock to U.S.-citizen mothers and fathers who do not meet the physical-presence requirements in Sections 1401(a). In contrast, the court of appeals' chosen solution would bestow U.S. citizenship upon untold numbers of persons who have never had any reason to believe they were citizens and may never have developed meaningful ties to the United States, and it would raise questions concerning the status of their children, grandchildren, and other descendants.

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[11] The INA itself reflects the courts' constrained authority. In 8 U.S.C. 1421(d), Congress has specified that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA] and not otherwise."

B. The court of appeals also erred insofar as it believed the remedy it imposed was consistent with congressional intent. The court noted that, before 1940, Congress had allowed the foreign-born children of U.S.-citizen fathers (and eventually mothers) to be U.S. citizens from birth if the parent had resided in the United States at any time prior to the birth. Pet. App. 37a-38a. But that was before Congress specifically addressed the distinct issues concerning children born out of wedlock. And the court of appeals in any event took the wrong lesson from the "historical background against which Congress enacted the relevant provisions" in the statutory framework actually challenged here. *Id.* at 37a. The relevant question is what the intent of Congress in 1952 (or 1940, when Congress first expressly addressed the situation of children born out of wedlock) would have been if a court were to hold the provisions unconstitutional. The intent of that Congress was plainly to impose new physical-presence requirements on all U.S.-citizen parents of children born abroad when the other parent was an alien—and indeed to impose ten- and five-year physical-presence requirements even when the parents were *married* when the child was born. It would be fundamentally inconsistent with that statutory scheme for a court instead to require only one year of continuous physical presence for all U.S.-citizen fathers when they were *not* married at the time of the child's birth and might not have legitimated the child until years later, whether by later marriage to the child's alien mother (as occurred in respondent's case) or otherwise. The court of appeals erred in rejecting that clear manifestation of congressional intent merely because

it could not "tell with confidence" whether that change "related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors." *Id.* at 38a. Whatever the explanation, it could not be more clear that Congress intended in 1940 and 1952 to impose substantial physical-presence requirements in order for the children born abroad of one U.S.-citizen parent and one alien parent to acquire U.S. citizenship from birth.

Congress enacted a general rule in Section 1401(a)(7) (applicable to children born out of wedlock through Section 1409(a)) of imposing the longer physical-presence requirement in the case of the great majority of foreign-born children who had a U.S.-citizen parent when the other parent was an alien—married mothers, married fathers, and unmarried fathers who legally established their paternity. The allowance of a shorter (albeit continuous) period in Section 1409(c) applied only in the case of the child born out of wedlock to a U.S.-citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress would have preferred to let the exception swallow the rule. Since 1940, Congress has always applied to unmarried U.S.-citizen fathers the longer physical-presence requirements applicable to married U.S.-citizen fathers (and mothers). The court of appeals' remedy "convert[s] what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835. Indeed, in crafting the INA in 1952, Congress considered —and declined to adopt—an amendment that would have applied the shorter one-year continuous-physical-

presence requirement in what became Section 1409(c) to all foreign-born children of parents with different nationalities. See S. 2842, 82nd Cong., 2d Sess. § 301(a)(5) (1952). Thus, all relevant indications support the conclusion that, if forced to eliminate the differential treatment, Congress would not have chosen the remedy imposed by the court of appeals.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

IAN HEATH GERSHENGORN
Acting Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys

AUGUST 2016

APPENDIX

1. 8 U.S.C. 1401 (1958) provided:

Nationals and citizens of United States at birth.

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year

prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsec-

tion (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[1] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

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[1] So in original. Probably should read "United States".

2. 8 U.S.C. 1409 (1958) provided:

Children born out of wedlock.

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(a)(7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such

person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

3. The Nationality Act of 1940, ch. 876, Tit. I, §§ 201, 205, 54 Stat. 1138-1140, provides:

SEC. 201. The following shall be nationals and citizens of the United States at birth:

(a) A person born in the United States, and subject to the jurisdiction thereof;

(b) A person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(c) A person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has resided in the United States or one of its outlying possessions, prior to the birth of such person;

(d) A person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who resided in the United

States or one of its outlying possessions prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(e) A person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who resided in the United States or one of its outlying possessions prior to the birth of such person;

(f) A child of unknown parentage found in the United States, until shown not to have been born in the United States;

(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying pos-

sessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

The preceding provisos shall not apply to a child born abroad whose American parent is at the time of the child's birth residing abroad solely or principally in the employment of the Government of the United States or a bona fide American, educational, scientific, philanthropic, religious, commercial, or financial organization, having its principal office or place of business in the United States, or an international agency of an official character in which the United States participates, for which he receives a substantial compensation;

(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934.

* * * * *

SEC. 205. The provisions of section 201, subsections (c), (d), (e), and (g), and section 204, subsections (a) and (b), hereof apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court.

In the absence of such legitimation or adjudication, the child, whether born before or after the effective date of this Act, if the mother had the nationality of

the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status.

4. The Immigration and Nationality Act, ch. 477, Tit. III, §§ 301, 309, 66 Stat. 235-236, 238-239 provides:

SEC. 301. (a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe: *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom

is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a child of unknown parentage found in the United States under the age of five years, until shown, prior to his attaining the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such cit-

izen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

* * * * *

SEC. 309. (a) The provisions of paragraphs (3), (4), (5), and (7) of section 301(a), and of paragraph (2) of section 308, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405, the provisions of section 301(a)(7) shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this Act, as of the date of birth, if the paternity of such child is established before or after the effective date of this Act and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United State or one of its outlying possessions for a continuous period of one year.